FILED
OCT 17 1979
MICHAEL RODAK, JR., CLERK

SUPREME COURT OF THE UNITED STATES

ANDRE L. McSHAN)

Petitioner,)

VS.) Case No. 79-5518

~~THE UNITED STATES OF AMERICA~~ GEORGIA,)

Respondent.)

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT FROM THE SUPREME COURT OF GEORGIA
AND THE COURT OF APPEALS OF GEORGIA

MURRAY M. SILVER, P.C.
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SUPREME COURT OF THE UNITED STATES

ANDRE L. McSHAN,)

Petitioner,)

VS.) Case No. _____

~~THE UNITED STATES OF AMERICA~~ GEORGIA,)

Respondent.)

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO APPEAL AS A POOR PERSON

ANDRE L. McSHAN, being duly sworn, deposes and says:

1. This affidavit is made pursuant to 28 U.S.C., Section 1915, in support of my motion to appeal in forma pauperis.

2. I am the petitioner in this action.

3. I wish to appeal from the judgment of the Supreme Court of Georgia, case # 352702, and the Court of Appeals of Georgia, Case # 57285, entered on September 4, 1979.

4. That the Court erred in over-ruling the Motion to Suppress in said case because of and illegal search of the person of the petitioner.

I am unable to pay the court fees and costs necessary to prosecute my appeal, and I am also unable to give security for their payment.

I am unemployed and without any funds to pay the costs involved herein, I have no property and have no one from whom I can borrow the money to pay the cost.

5. I therefore request leave to prosecute the proposed appeal in forma pauperis.

DATED: October 12, 1979.

Andre L. McShan
ANDRE L. McSHAN

Sworn to and subscribed
before me this 12th day of
October, 1979.

Murray M. Silver
NOTARY PUBLIC

Notary Public, Georgia State at Large
My Commission Expires July 20, 1983

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SUPREME COURT OF THE UNITED STATES

ANDRE L. McSHAN,)

Petitioner,)

VS.) Case No. _____

~~THE UNITED STATES OF AMERICA~~ GEORGIA,)

Respondent.)

MOTION FOR LEAVE TO APPEAL AS A POOR PERSON

Defendant, ANDRE L. McSHAN, moves, pursuant to 28 U.S.C., Section 1915, for an order granting leave to appeal in forma pauperis from the judgment entered on September 4, 1979, without prepayment of costs and fees, and without giving security therefor.

The attached affidavit is filed in support of this motion.

DATED: October 12, 1979.

Respectfully submitted,

Murray M. Silver

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SUPREME COURT OF THE UNITED STATES

ANDRE L. McSHAN)
Petitioner,)
VS.) Case No. _____
GEORGIA ~~THE UNITED STATES OF AMERICA~~,)
Respondent.)

PETITION FOR A WRIT OF CERTIORARI
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

_____

No._____

_____

ANDRE L. McSHAN,

Petitioner,

versus

GEORGIA
~~UNITED STATES OF AMERICA~~

Respondent.

_____

PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES SUPREME COURT

FROM THE SUPREME COURT OF GEORGIA AND

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No._____

ANDRE L. MCSHAN — Petitioner-Appellant

VS.

~~UNITED STATES OF AMERICA~~ GEORGIA — Respondent-Appellee

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES FROM THE SUPREME COURT OF GEORGIA AND THE COURT OF APPEALS OF GEORGIA

Petitioner ANDRE L. MCSHAN prays that a writ of certiorari issue to review the final judgment of the Supreme Court of Georgia and the Court of Appeals of Georgia entered in this case on September 4, 1979, affirmed by the Supreme Court of Georgia on September 4, 1979, wherein the Court denied the Writ of Certiorari in this case. That prior thereto, the Court of Appeals of Georgia affirmed the Petitioner's conviction, (see opinion attached hereto rendered by SHULMAN, Judge) as well as the order denying the Motion for Reconsideration and Rehearing, a copy of which is attached hereto.

JURISDICTION

The final judgment of the Supreme Court of Georgia was entered on September 4, 1979. The jurisdiction of this Court is invoked under Title 28, United States Code, Seciton 1254.

QUESTIONS PRESENTED

1. The Court of Appeals of Georgia fails to recognize that both the initial detention and subsequent search are constitutionally impermissable because probable cause was lacking.
2. The Court erroneously cited cases in support of its decision which are inapposite to the case subjudice.
3. The Court of Appeals of Georgia overlooked material facts in the record.

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4. The decision of the Court of Appeals of Georgia is error in that the burden is upon the State to establish the case by a prepondurance of the testimony beyond a reasonable doubt.
5. That the decision of the Court of Appeals of Georgia is directly contrary to a recent decision on the same question rendered by the Supreme Court of the United States.
6. That the decision of the Court of Appeals is contrary to the law and precedent in such cases and the effect of the Court's decision materially affects the public welfare in that it creates a police state and subjects the citezenry to complete and unbridled movement of interstate transportation.
7. Substantial justice demands that this Court as a Court of last resort consider and review the decision of the Court of Appeals of Georgia in this case.

STATEMENT OF THE CASE

This criminal action was brought pursuant to a one count indictment charging the Appellant-Defendant, Andre L. McShan with the offense of violation Georgia Controlled Substances Act for that said accused, in the County of Fulton and State of Georgia on the 13th day of March, 1978 not being authorized under any provision of the Georgia Controlled Substances Act to do so, did unlawfully possess and have under his control cocaine, said cocaine being a controlled substance in Schedule II of said Act; MCSHAN pled not guilty to said indictment at arraignment on May 5, 1978. He filed a Motion to Suppress the Evidence and the Motion was overruled. He appealed to the Court of Appeals of Georgia and his appeal was denied. Subsequently thereto, his Motion for Rehearing in the Court of Appeals of Georgia was denied, and finally his Writ of Certiorari to the Supreme Court of Georgia was denied.

STATEMENT OF THE FACTS

During a Motion to Suppress hearing before the Honorable Judge Luther Alverson, Judge of Superior Court, Fulton County Georgia. The agent and arresting officer testified extensively concerning his background and experience in "Drug courier Profiles," the knowledge of which he had acquired over a period of investigating at airports in Atlanta, Georgia and in Detroit, Michigan.

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After that lengthy testimony, the following testimony was outlined:

That the agent was on duty at the Atlanta airport at approximately 3:10 p.m. on March 13, 1978, he was alone and surveilling passengers deplaning from a Delta Air Lines flight from Miami, Florida. That he observed appellant McShan deplaning from said flight in a state of "unusual nervousness" and decided to follow him. He followed appellant to the baggage claim area where the appellant claimed a suit-bag and proceeded to walk in an unusually "rapid pace" toward the escalator. As the appellant reached the excalator the agent approached him, identified himself as a law enforcement officer and asked the appellant for his identification. The appellant produced his Alabama driver's license which was issued in his own name, in a manner which the agent described as "very cordial." The agent continued to ask for the appellant's airline ticket which was issued to a Mr. Paul Daniels and in explanation thereof the appellant said that "his cousin had purchased the ticket for him." The agent then observed the address label on the appellant's clothes bag which also bore the name of Daniels and the appellant stated the bag was his. The agent then asked appellant whether or not he was "carrying any drugs or narcotics" and the appellant replied that he was not. Subsequently, the agent asked appellant if he "would mind allowing us to briefly conduct a search of his person and his property" and the appellant reluctantly agreed to accompany the agent to the airport precinct office. During a search of the appellant's suit-bag the agent discovered a small amount of cocaine and a small amount of marijuana.

The appellant was sworn and testified as follows:

Upon exiting the aircraft, the appellant walked directly to the baggage claim area, waited 10 or 15 minutes for his bag and walked alone to the escalator. In his opinion he was not acting in any nervous manner. When the agent approached him he revealed that he was a federal official and that he "had been informed that drugs were being transported through the Atlanta Airport." He stated further that after the agent asked for his identification he questioned him as to whether he was in possession of narcotics to which the appellant replied "why would you ask me that, and why are you stopping me, and for what reason?" The agent's response was that the appellant would have to go the the precinct and if he had no drugs everything would be OK. The appellant also testified that he had no idea that he could refuse the search and keep on walking, as it was his impression that he could not continue and that he would have to go into the precinct with the agent.

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SUPREME COURT OF THE UNITED STATES

ANDRE McSHAN,)

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THE UNITED STATES OF AMERICA,)

Respondent.)

BRIEF IN SUPPORT OF APPLICATION FOR CERTIORARI
PART ONE
ARGUMENT AND AUTHORITIES

It is urgent and imperative that this Court carefully review the facts in this case. This case should not be placed in "a category" because the facts here are unique and merit this Court's closest scrutiny. It is equally important that this Court understand the history of this type surveillance and the characteristics or profile that has been adopted by these agents.

From page 3 of the transcript through and including page 24 of the transcript, Paul Markonni, an agent with the Drug Enforcement Administration in Atlanta testified concerning Airport surveillance, its origination, objectives and experiences. He outlined what he regarded as the same basic modus operandi or seven characteristics of "drug couriers." (See transcript page 5, 6.)

"The seven (7) principal characteristics consist of 1) arrival from or departure to an identified source city; 2) carrying little or no luggage, or large quantities of empty suitcases; 3) unusual itinerary, such as a rapid turnaround time for a very lengthy airplane trip; 4) use of an alias; 5) carrying unusually large amounts of currency in the many thousands of dollars, usually on thier person, in briefcases or bags; 6) purchasing airline tickets with a large amount of small denomination currency; and 7) unusual nervousness beyond that ordinarily exhibited by passengers." (See transcript page 6-10.)

Much of what the agent testified about was his general suspicion, sometimes confirmed other times not confirmed by arrests. Almost all of his testimony dealt with his general impressions - not specifically related to this appellant and not based upon objective criteria.

"There is no authority in Georgia under which a citizen may be arrested without a warrant and held for investigation to determine if he has committed some crime merely because the person making the arrest has a suspicion that the person arrested may have committed some then unknown crime." RAIF V. STATE, 109//354.

"The arrests were illegal and if the evidence obtained after such illegal arrests from the defendants was not voluntarily given then, under the Mapp case, supra, such evidence being the fruits of an illegal search and seizure of the persons, was inadmissible. The police officers, who obtained such evidence, testified they merely asked the prisoners for the evidence and they gave it to them. It is contended that such evidence was freely and voluntarily furnished by the defendants and under such circumstances was admissible. In reply to this contention it is only necessary to refer to the language of Justice Lumpkin in Chattahoochee Brick Co. v. Braswell, 92 Ga. 631, 634 (18 SE 1015): "The plaintiff was a convict, and according to the evidence, his movements were absolutely controlled and directed by a guard, or 'boss,' whose orders he was compelled to obey. This guard had and exercised over him the most complete dominion and authority. The plaintiff's position, so far as the power of the guard was concerned, was more that of a slave than a mere servant, and it is apparent that he dared not disobey any of the guard's commands." A prisoner in police custody by reason of an illegal arrest is in no position to refuse to comply with the demands of the officer in whose custody he is placed whether such demand is couched in the language of a polite request or a direct order. If a command, the prisoner is directly forced to comply, and if a request, he is indirectly forced to comply." See: Raif above.

Of the 7 principal characteristics only number 1 and 4 apply.

The agent also testified that over a period of 7 months 85 people were approached for identification, 72 were searched, of which 48 consented, the remainder did not consent, however, he searched them any how, and got search warrants in only 7 or 8

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392 US40 (1968).

"The unsupported assertion or belief of the officer does not satisfy the requirement of probable cause." JONES VS. UNITED STATES, 362 U.S. 257, 269 (1960). See also SPINELLI VS. UNITED STATES, 393 U.S. 410, 423 (1969).

The Fourth Amendment states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

These, I protest, are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. And one need only briefly to have dwelt and worked among a people possessed of many admirable qualities but deprived of these rights to know that the human personality deteriorates and dignity and self-reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure by the police.

The decision of the Court of Appeals fails to recognize that both the initial detention and subsequent search are constitutionally impermissable because probable cause was lacking.

"No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." Union Pac. R. Co. v. Botsford, 141 U.S. 250, 251, 11 S.Ct. 1000, 35 L.Ed. 734 (1891).

It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away he has "seized that person. TERRY VS. OHIO, 392 U.S. 1, 16 (1968).

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In our view of the sounder course is to recognize that the Fourth Amendment governs all intrusions by agents of the public upon personal security, and to make the scope of the particular intrusion, in light of all the exigencies of the case, a central element in the analysis of reasonablness. Cf. Brinegar v. United States, 338 U.S. 160, 183, 69 S.Ct. 1302, 1314, 93 L.Ed. 1879 (1949) (Mr. Justice Jackson dissenting). (See Terry pg 17).

The stop and inquiry must be reasonably related in scope to the justification for their initiation." (See Terry pg 29).

"The infringement on personal liberty of any 'seizure' of a person can only be 'reasonable' under the Fourth Amendment if we require the police to possess 'probable cause' before they seize him. Only that line draws a meaningful distinction between an officer's mere inkling and the presence of facts within the officer's personal knowledge which would convince a reasonable man that the person seized has committed, is committing, or is about to commit a particular crime." TERRY V. OHIO, supra, at 38, 20 l Ed 2d 889, 88 S.Ct. 1868.

"'Police power exercised without probable cause is arbitrary. To say that the police may accost citizens at their whim and may detain them upon reasonable suspicion is to say, in reality, that the police may both accost and detain citizens at their whim.'" Amsterdam, Perspectives on the Fourt Amendment, 58 Minn L Rev 349, 395 (1974).

B. THE COURT ERRONEOUSLY CITED CASES IN SUPPORT OF ITS DECISION WHICH ARE INAPPOSITE TO THE CASE SUB JUDICE.

The Court of Appeals erroneously cited cases in support of its decision such as State vs. Reid case #57466, decided April 4, 1979 and reported in 149 Ga. Appeal 685.

A careful, comparative review of the facts reveal that Reid is inapposite to the case sub judice.

Reid involved two men. The record does not reflect whether the agent received any tip or information from an informant, and Reid is highly suspect, using the agents "profile," at least 5 of the characteristics are present. Reid began running and Reid threw his purse away which police recovered after Reid was cap-

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tured. NONE of these elements are present in the case sub judice.

The factors herein do not constitute an "articulable SUSpicion" sufficient to justify a stop. Whereas in Reid the flight would provide cause for the apprehension and ultimate search of the discarded purse.

Another case cited by the Court is United States v. Chadwick, 433 U.S. 1 (1977).

Here, again, comparative review of the facts reveal that reliance upon Chadwick is misplaced.

Chadwick involves a TIP from railroad officials that two men with a brown footlocker, heavy for its size, leaking talcum powder, which is often used to mask the odor of marihuana, and matching a profile used to spot drug traffickers; whereas in McShan's case none of these elements are present.

In Chadwick the officers had a police dog trained to detect marihuana which signalled the presence of the controlled substance. And in Chadwick the officers seized the foot locker, took it to their headquarters and one and one half hours later opened it without a warrant.

In Chadwick the U.S. District Court held that the footlocker search was NOT justified either under the "automobile exception" or as a search incident to a lawful arrest. The Court of Appeals for the First Circuit affirmed the suppression of the marihuana and concluded that a rule permitting a search of personalty on probable cause alone had not yet "received sufficient recognition by the Supreme Court outside the automobile area, or generally, for us to recognize it as a valid exception to the Fourth Amendment warrant requirement." 532 F 2d 773, 781 (1976). The Supreme Court granted certiorari and AFFIRMED: stating "There being no exigency, it was unreasonable for the government to conduct this search without a warrant.

The Fourth Amandment "protects people, not places" Katz v. United States, 389 U.S. 347, 351 (1967). The framers of the Constitution were men who focused on the crongs of that day but who intended the Fourth Amendment to safeguard fundamental values which would far outlast the specific abuses which gave it birth.

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A fundamental purpose of the Fourth Amendment is to safeguard indivisuals from unreasonable government invasions of legitimate privacy interests and this has been settled law in the U.S. Supreme Court for over 90 years. (See Boyd v. United States, 116 U.S. 616, (1886).

So appellant respectfully urges that Chadwick offers no support whatsoever to the decision of the Georgia Court of Appeals.

The Court of Appeals then concluded "Even assuming that appellant is correct in his contention that an illegal detention or arrest had occurred, it does not follow that the evidence produced from the search was necessarily subject to exclusion." (See opinion case #57285, pg 2), and the Court cited Ivins vs. State, 129 Ga. Appeals 865, 868.

Ivins presents no support for the Court's judgment.

"Merely placing a possible criminal construciton on a thing or event which will support other construcitons is not a reliable tactic to justify personal searches." See Uva v. State, 124 Ga. App. 486. (Also see Ivins pg 867).

The record in Ivins will not support the position that Ivins voluntarily consented to the search. (See Ivins pg 867 (2)). Nor do we find that the record reflects Ivins "consent" to the search of his knapsack. The most it shows is that the officers said they "would have to look at everything in the bag" and Ivins apparently acquiesced in that exercise of apparent authority. We do not find that such acquiescence as Ivins showed equals consent. (See Ivins pg 867, 868).

Though custody does not necessarily preclude voluntariness, see U.S. v. Fike, 449 F2d 191 (5th Cir.), on this record we are unable to find consent; the most we find is an apparent lack of protest, and this is not adequate, see Ray v. U.S., 84 F2d 654 (5th Cir.), to carry the state's burden which is particularly strong in cases of illegal custody.

What may be "consent" as to other individuals may not always be regarded as "consent" to the requests of an officer of the law. See Holtzendorf v. State, 125 Ga. App. 747, 751 (188 SE2d 879). Accord, Ray v. U.S., supra.

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The Court of Appeals then cites Radowick vs. State 145//231 in support of its judgment, and that too is misplaced. Radowick involves a truck and an informant's tip and a consent to search form was secured, There is no comparision in the factual basis in McShan and Radowick, even though in Radowick the conviction was reversed.

"If the exclusionary rule invoked here for suppression of evidence is to act as a deterrent to illegal law enforcement practices (Brown v. Illinois, 422 U.S. 590 (1) (95 SC 2254, 45 LE2d 416)), it must be applied to the factual predicate of the instant case or the converse rule will emerge. That is, if illegal detention for an extended period of time, without prior probable cause, is not sufficient to exclude evidence obtained thereby, then police officers have been judicially licensed to illegally detain suspects, without probable cause, for extended periods of time, until the will of the suspect succumbs to the coercive effect of illegal police action. This court cannot countenance illegal acts even though they achieve desired civic solutions." (See Radowick pg 242).

The Court then cites Hall vs. State, 239 Ga. 832 (1). This case is entirely and completely irrelevant to the McShan case. Hall deals with consent being obtained from a third party who possessed common authority over the premises or effects sought to be inspected.

McShan did not give a valid consent authorizing the search and the motion to suppress was improperly denied.

The Court also cites Hill vs. State, 140 Ga. App. 121, which gives the Court little consolation. Hill contains an excellent discussion on page 124. By now "Chief Justice Nichols: 2. Was there a search of the appellant? If so, was it legal? The state asserts that appellant gave Officer Mills permission to look through his backpack. In Raif v. State, 109 Ga. App. 354, 358 (136 SE2d 169), "A prisoner in Police custody by reason of an illegal arrest is in no position to refuse to comply with the demands of the officer in whose custody he is placed whether such demand is couched in the language of a polite request or a direct order. If a command, the prisoner is directly forced to comply, and if a request, he is indirectly forced to comply." Under the facts of this case we cannot accept the state's contention that the appellant's consent to the search was truly voluntary and that the search was lawful. See Holtzendorf v. State, supra.

3. In order for the search to have been valid the arrest must have been legal. Johnson v. State, 111 Ga. App. 298 (2) (141 SE2d 574). It was not. What would have happened if the two hitchhikers had refused to accompany the policemen to headquarters? The assertion that they were not physical detained and were free to refuse to go with the policeman lacks reality. Similarly contrary to reality is the contention that the consent to search was voluntary because of the officer's subjective view that appellant was free to depart. The search cannot supply probable cause for and thereby validate the subsequent "formal" arrest for burglary. Where no reasonable cause for the defendant's arrest existed when the search was made and it was not made in connection with or incident to a lawful arrest without a warrant then the search was unlawful. Brewer v. State, 129 Ga. App. 118 (1) (199 SE2d 109). "It is axiomatic that an incident search may not precede an arrest and serve as part of its justification. E.g., Henry v. United States, 361 U.S. 98 (1959); Johnson v. United States, 333 U.S. 10, 16-17 (1948)." Sibron v. New York, 392 U.S. 40, 63. SUPRA.

The motion to suppress the evidence seized during the unlawful search should have been granted, and it was error to admit it into evidence. "The obtaining of the evidence was tainted by the illegal arrest." Kelly v. State, 129 Ga. App. 131, 133 (3), supra.

The arrest of McShan was illegal. The motion to suppress the evidence seized during the unlawful search should have been granted.

D. The decision of the Court of Appeals is error in that the burden is upon the State to establish the case by a preponderance of the testimony beyond a reasonable doubt.

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McShan testified under oath and was not contradicted on major points: His testimony established that he did not fit the "profile" that the agent related.

He stated he was not nervous (transcript p 61) and that his conduct and behavior at that time was "not out of the ordinary." He did not pace up and down while waiting for his luggage, and when approached by the agent he responded to the question of his name, with his true name. He also gave the agent his true identity in the form of his driver's license. (Transcript p 62) and that this was done after he picked up his baggage. He questioned the agent: "After telling me that he had been informed that drugs were being brought through the Atlanta airport, he asked if I had any drugs on me and I think I asked him, "Why would you ask me that and why are you stopping me and for what reason," and I think his reply was something to the effect of what he had been informed of and that I would need to proceed to the precinct and if, you know, if there were no drugs in my possession, everything would be okay, if you have drugs, it's a problem; if there are no drugs there, you know, everything will be all right, but you have to go to the precinct." (See transcript p 63) "I was told that I would have to go into the precinct, and then I said, "Why --" you know, "why is all this necessary," or, "why are you stopping me," and then that is when I was told, you know, "You will have to go into the precinct and if you don't have no drugs, everything will be okay." (See transcript pp 63 and 64).

Constitutionally speaking the appellant met all ethical requirements when he supplied his name and identification, although there is some question whether the agent had any reason to stop him whatsoever, and if he had some reason, it was disspelled when he produced his identification and correct name. There was NO reason for him to be stopped and detained. The rights of appellant as well as the rights of the numerous people that he stopped (transcript p 52) have been trampled, some 85 persons (his count) in seven months in Atlanta he stopped and questioned, when frankly speaking, he had no legal right to do whatsoever. The harrassment, inconvenience and embarassment caused these persons is apparently no concern to this agent--the citizens are at his whim and caprice. The police power practiced here exceeds all tolerable limits. Its none of his business where the appellant flew, who he was with, or in whose name the ticket was purchased.

E. THAT THE DECISION OF THE COURT OF APPEALS OF GEORGIA IS DIRECTLY CONTRARY TO A RECENT DECISION ON THE SAME QUESTION RENDERED BY THE SUPREME COURT OF THE UNITED STATES.

In a very recent decision--June 25, 1979--Brown vs. Texas case number 77-6673, the U.S. Supreme Court unanimously overturned the conviction of a Texas man for violating a state law making it a crime to refuse to identify oneself to a policeman. The opinion by Chief Justice Burger, held that the statute was unconstitutionally applied in this case, because the police had no reason to suspect the man of any specific misconduct but simply thought he "looked suspicious."

"When such a stop is not based on objective criteria," Chief Justice Burger wrote, "the risk of arbitrary and abusive police practices exceeds tolerable limits."

For these reasons the judgment of the Court of Appeals should be reviewed and Judgment rendered by this Court reversing the conviction in said case.

MURRAY M. SILVER, P.C.
Attorney for Appellant

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CERTIFICATE OF SERVICE

This is to certify that I have this day forwarded a copy of the foregoing Application for Writ of Certiorari to the Supreme Court of the United States for the writ of certiorari to Hon. Isaac Jenrette, Asst. District Attorney, 150 Pryor St., Fulton County Courthouse, Atlanta, Georgia 30303, by depositing in the U.S. mail a properly addressed envelope with adequate postage thereon.

This 15th day of October, 1979.

MURRAY M. SILVER, P.C.
Attorney for Appellant

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ATLANTA GEORGIA

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

Atlanta SEP 04 1979

Dear Sir:

Case No. 35270. McShan v. The State

" The Supreme Court today denied the writ of certiorari in this case. "
All the justices concur.

Very truly yours,
MRS. JOLINE B. WILLIAMS, Clerk

Court of Appeals of the State of Georgia

ATLANTA, June 7, 1979

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

57285 Andre L. McShan v. The State

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

Court of Appeals of the State of Georgia

CLERK'S OFFICE, ATLANTA JUN 7 1979

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

CLERK.

MAY 8 1979

57285. McSHAN v. THE STATE. Sh-37

SHULMAN, Judge.

This appeal follows the verdict of a trial judge, sitting without a jury, finding defendant guilty of violating the Georgia Controlled Substances Act. We affirm.

1. At the hearing on the motion to suppress, an experienced federal drug enforcement agent testified to observing certain behavior on the accused's part which confirmed the agent's suspicion that the accused might be connected with criminal activity. Appellant was unusually nervous upon deplaning from a flight arriving at Hartsfield International Airport from Miami, Florida (a significant narcotics distribution center). Appellant surveyed the people in the terminal waiting area, not as if looking for any person in particular, but as if looking for possible undercover agents. While en route to the baggage claim area, appellant looked over his shoulder several times as if to determine whether he was being followed. At the baggage claim area, the accused picked up a suit bag and nothing else. As this observed behavior was consistent with that of a narcotics courier, the agent identified himself to the accused and briefly detained the accused for questioning. After the officer determined that the accused was traveling under a name other than his own, the officer requested permission to conduct a search of appellant's person and property. The search produced the contraband which formed the basis of this prosecution.

We need not consider appellant's contention that both the initial detention and subsequent search were constitutionally impermissible because probable cause was lacking. See generally, in this regard, State v. Reid, Case No. 57466, decided April 4, 1979, where flight supplied probable cause to search after a valid initial detention. Compare United States v. Chadwick, 433 U.S. 1 (1977), holding, in a nonconsensual search situation, that a search warrant must be secured even when probable cause existed to believe a footlocker contained narcotics.

Even assuming that appellant is correct in his contention that an illegal detention or arrest had occurred, it does not follow that the evidence produced from the search was necessarily subject to exclusion. Notwithstanding the legality of the initial detention or arrest, a valid consent authorizing the search may be found which renders the fruits of the search admissible. See, e.g., Ivins v. State, 129 Ga. App. 865, 868 (201 SE2d 683). Radowick v. State, 145 Ga. App. 231 (4) (244 SE2d 346), Hall v. State, 239 Ga. 832 (1) (238 SE2d 912). As the record in this case indicates without contradiction that appellant intelligently and voluntarily consented to the search of his possessions after being fully informed that he had a right to refuse the search, the trial court was authorized to find that valid consent had been given. Brand v. State, 129 Ga. App. 747 (201 SE2d 180). Compare Ivins, supra, Division 2; and Hill v. State, 140 Ga. App 121 (2) (230 SE2d 336). Because the evidence showed a valid consent authorizing the search, the motion to suppress was properly denied.

2. The accused waived jury trial and elected to submit the case to a trial judge, sitting without a jury, on the basis of stipulated evidence developed in the suppression hearing. On appeal, it is urged that the court improperly considered certain self-incriminating statements made by the accused at the hearing and that, because of this, reversal is in order. We must take issue with appellant's position.

The trial judge affirmatively stated that the statements complained of would not be considered in determining the accused's criminal culpability. See, in this regard, Ward v. State, 26 Ga. App. 61 (105 SE 373). Cf. Benefield v. State, 140 Ga. App. 727 (12) (232 SE2d 89), where the trial court affirmatively stated certain evidence would not be considered in passing sentence. This being so, we find no error.

Judgment affirmed. Deen, C. J., and McMurray, P. J., concur.

DEC 26 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-5518

ANDRE L. McSHAN,

Petitioner

v.

STATE OF GEORGIA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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BRIEF FOR THE RESPONDENT IN OPPOSITION

QUESTION PRESENTED

Does a momentary stopping of an individual for identification when that person's conduct is in conformity with a set of objective operative facts which are indicative of one engaged in drug trafficking constitute an unreasonable seizure or stopping under the Fourth Amendment?

STATEMENT OF THE CASE

Petitioner Andre L. McShan was indicted by a Fulton County, Georgia grand jury for possession of cocaine, which is a violation of the Georgia Controlled Substances Act. (R. 4-5).[1/] Petitioner waived a jury trial and the court found him guilty as charged. (T. 11; T. 1, 82).[2/] A sentence of two years imprisonment was imposed (R. 12); Petitioner's conviction was affirmed on direct appeal, McShan v. State, 150 Ga. App. 232, ___S.E.2d___(1979); and the Georgia Supreme Court denied a writ of certiorari.

The State's evidence at trial showed that an experienced agent of the Drug Enforcement Administration was observing the deplaning of passengers in Atlanta from a nonstop flight from Miami on March 13, 1978. (T. 3-4, 24). At that time Miami was the most significant cocaine distribution city in the United States. (T. 9, 25).

The agent saw Petitioner deplane, and when Petitioner entered the arrival area, he glanced around the arrival area as if he were looking for plain clothes police officers. (T. 25, 40). As Petitioner walked down the concourse, he kept looking behind him as if to see if someone were following him. (T.25). At the baggage area he seemed to be very nervous, paced about in the small area, and continually looked about at people. (T. 25-26).

At the baggage area he picked up a thin clothes bag, which appeared to contain very few items. (T. 26-27). Petitioner got on the escalator; the agent identified himself to Petitioner and

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1/ Respondent refers to the record prepared for appeal by the Clerk of the Superior Court of Fulton County.

2/ T. refers to the trial transcript.

asked for identification. (T. 27). Petitioner gave him a driver's license in the name of Andre McShan; but the agent then asked for Petitioner's airline ticket which was in the name of Paul Daniels. (T. 28-29). Petitioner said his cousin had bought the ticket for him. (T. 29).[3/] The agent noticed the identification sticker on the clothes bag was in the name of Daniels, and the address on the sticker was different from the address on the driver's license. (T. 30). During this conversation Petitioner's hands were shaking, and he was trying to force a smile. (T. 30).

Petitioner fit the drug courier profile in several respects:

(1) Most couriers are between the ages of 22 and 30; Petitioner was 29 years old at the time. (T. 18, 59).

(2) Petitioner was arriving from Miami, the major cocaine distribution city. (T. 9, 25).

(3) He was extremely nervous. (T. 25-26, 30).

(4) He was carrying a very small amount of luggage. (T. 26-27).

(5) After he got off the plane, he was looking around frequently, as if to spot plain clothes police officers. (T. 25-26, 40).

(6) Petitioner was not traveling under his correct name. (T. 28-29).

[3/] At trial Petitioner admitted the name of Paul Daniels was fictitious. (T. 74).

The agent, who was not in uniform and had no weapon displayed, asked if he could search Petitioner. (T. 27, 31). It is undisputed Petitioner consented to going to the precinct station and consented to being searched, as he testified to these facts. (T. 69, 76).

The airport precinct station was only 40-45 yards from the escalator, and Petitioner was not under arrest when he voluntarily went to the station. (T. 31). The agent did not place his hands on Petitioner nor did the agent even display his weapon. (T. 31).

At the airport precinct station the agent asked Petitioner's consent to conduct the search and advised Petitioner he had the right to refuse the search, but Petitioner still consented. (T. 31-33). In Petitioner's luggage the agent found some marijuana and cocaine having a street value of approximately $5,000.00. (T. 32, 57, 86). At that time the agent placed Petitioner under arrest. (T. 32).

REASON FOR NOT GRANTING THE WRIT

A MOMENTARY STOPPING OF AN INDIVIDUAL FOR IDENTIFICATION WHEN THAT PERSON'S CONDUCT IS IN CONFORMITY WITH A SET OF OBJECTIVE OPERATIVE FACTS WHICH ARE INDICATIVE OF ONE ENGAGED IN DRUG TRAFFICKING DOES NOT CONSTITUTE AN UNREASONABLE SEIZURE OR STOPPING UNDER THE FOURTH AMENDMENT.

This Court has granted certiorari to consider the above question upon application from the United States Attorney in the East District of Michigan in United States v. Mendenhall, No. 78-1821, cert. granted, October 3, 1979, 596 F.2d 706 (6th Cir. 1979). In United States v. Mendenhall, 596 F.2d 706 (6th Cir. 1979), the Court of Appeals referred to an earlier decision of that court. See United States v. McCaleb, 552 F.2d 717 (6th Cir. 1977). In United States v. McCaleb, the persons were detained by agents at the airport and were not free to leave; moreover, the persons were advised that if they did not consent to the search, they would be detained until a search warrant could be obtained. Id. at 719-20. This line of cases is clearly distinguishable from Petitioner's in that he was asked for permission to search and was advised that he could refuse the search.

In several recent decisions this Court has been concerned with the reasonableness of law enforcement activity in stopping individuals either for licensing checks or motor vehicle registration, Delaware v. Prouse, __ U.S.___, 99 S.Ct. 1397, 59 L.Ed.2d 660 (1979), the stopping of an individual solely for identity when there was no reasonable suspicion to believe that

the individual was engaged, or had engaged in criminal conduct, Brown v. Texas, ___U.S.___, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979), and the reasonableness of a statute which permitted a governmental unit to inspect an individual's luggage short of there being any reasonable basis for suspicion that the individual was engaged in any criminal conduct. Torres v. Puerto Rico, ___U.S.___, 99 S.Ct. 2425, 61 L.Ed.2d 1 (1979).

Each of the above cases is distinguishable from the facts in this case which involved the stopping for identity of an individual whose conduct was suspicious in terms of a set of neutral and objective facts which the Drug Enforcement Administration had compiled in connection with individuals suspected of transporting drugs through an airport. This profile is based upon the experience of law enforcement officers with the methods used in drug trafficking. In Brown v. Texas, supra, the law enforcement officers who stopped an individual in an area coming out of an alley where there was known drug trafficking had no reasonable suspicion to believe that, that individual had in fact engaged in any criminal conduct. Likewise, in Delaware v. Prouse, supra, the stopping was a random stopping, and once again there was no reasonable or articulable suspicion that the individual stopped had in fact violated any of the rules of the road in the State of Delaware. Similarly, in Torres v. Puerto Rico, supra, the individual's conduct did not equate with a finding of probable cause to believe that there was any incriminating evidence in his luggage, or that any incriminating evidence would in fact be found. The "drug courier profile" to the contrary does furnish an articulable suspicion.

This Court has long recognized that any stopping by a law enforcement officer which restrains that individual's freedom

is a seizure. Terry v. State of Ohio, 392 U.S. 1, 16 (1968). By the same token, this Court recognized that there was no ready-made test for determining the reasonableness of a search and subsequent seizure other than by balancing the need to seize and search against unwarranted invasions from seizure and search. This is a balancing between public interests and the individual's right to personal security free from arbitrary interference by law enforcement officers. Brown v. Texas, supra; Pennsylvania v. Mimms, 434 U.S. 106, 107 (1977). This balancing is necessary to avoid arbitrary invasions at the unfettered discretion of law enforcement officers. Delaware v. Prouse, supra.

The Fourth Amendment is not a badge behind which criminal activity can be protected, see e.g., Harris v. New York, 401 U.S. 222, 226 (1971), nor does it protect all forms of search and seizure, but only unreasonable searches and seizures. Elkins v. United States, 364 U.S. 206, 222 (1960); Terry v. Ohio, supra at p. 8. This Court in Terry, supra, found that it was not unreasonable under the Fourth Amendment for a law enforcement officer to stop an individual for questioning when that individual had exhibited in the officer's presence conduct which was consistent with the hypothesis that a daylight robbery was contemplated by the individual approached.

> One general interest is of course that of effective crime prevention and detection; it is this interest which underlies the recognition that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest. Terry v. Ohio, supra, at p. 22.

Even earlier than Terry, this Court in Brinegar v. United States, 338 U.S. 160 (1949), recognized, "In dealing with probable cause, however, as the very name applies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act . . . Probable cause exists where the 'facts and circumstances within their (the officer's) knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." Brinegar, supra at pp. 175-176.

The issue presented by Petitioner is whether a law enforcement officer has reasonable suspicion to stop an individual for identification if that individual appears to fit within the framework of the "drug courier profile." Do the various components of the "drug courier profile" when put together, in part or in total, constitute sufficient operative objective facts which give rise to reasonably suspicious activity so as to justify an investigative stop for identification by a law enforcement officer? Respondent submits that this must be answered in the affirmative. In United States v. Brignoni-Ponce, 422 U.S. 873 (1975), this Court indicated that in deciding whether to stop an individual, the individual's behavior would be relevant, such as if the individual made obvious attempts to evade law enforcement officers, and such behavior can support reasonable suspicion. However, in Brignoni-Ponce, supra, this Court said that the mere fact that the individuals in the automobile had a Mexican appearance, standing alone, did not justify a stop.

Respondent agrees that it takes more than one factor to constitute an articulable or reasonable suspicion which will serve

as the basis for an investigative seizure. Respondent believes that this Court in Brignoni-Ponce, supra, did not dispense with the fact that a law enforcement officer in all situations is entitled to assess facts in light of his experience in detecting illegal entry or smuggling in determining whether there is a reasonable suspicion to stop a car or to stop an individual for identification. Respondent believes that this Court's recent pronouncements in Delaware v. Prouse, supra; Torres v. Puerto Rico, supra; and Brown v. Texas, supra, have not led to a holding that law enforcement officers based upon their training are to disregard conduct which would be wholly innocent to an untrained observer, but to the eye of a seasoned officer would indicate the serious likelihood that criminal activity is afoot. Brown v. Texas, supra, n. 2.

In Brinegar v. United States, supra, Mr. Justice Burton in his concurring opinion indicates that law enforcement officers must draw upon their experience in determining whether to stop an individual for identification.

> In my view, these earlier events not only justify the steps taken by the government agents but those events imposed upon the government agents a positive duty to investigate further, in some such manner as they adopted. It is only by alertness to proper occasions for prompt inquiries and investigations that effective prevention of crime and enforcement of law is possible. Government agents are commissioned to represent the interests of the public in enforcement of the law and this requires affirmative action not only when there is

> reasonable ground for an arrest or probable cause for a search but when there is reasonable ground for an investigation. This is increasingly true when the facts point directly to a crime in the course of commission in the presence of the agent. Prompt investigation may then not only discover but, what is still more important may interrupt the crime and prevent some or all of its damaging consequences. Id. at p. 179.

Respondent submits that with rapidly unfolding drug traffic being conducted through this nation's airports police response must be accordingly flexible. This response is envisioned in the "drug courier profile," which is based upon specific objective criteria of drug enforcement people in their experience in shutting down drug traffic. Terry v. Ohio, supra, recognizes that a stopping for identification when based on reasonable suspicion is not an unreasonable seizure. Terry, supra, as in this case, deals with a series of acts which of themselves appear innocent, but when taken together warrant further inquiry. In fact, this Court in Adams v. Williams, 407 U.S. 143 (1972), stated,

> The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary Terry recognizes that it may be the essence of good police work to adopt an intermediate response. A brief stop of a suspicious individual, in order to determine his identity or to maintain

> the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time. Id. at 145-146; accord, United States v. McDaniel, 550 F.2d 214, 217 (5th Cir. 1977).

The initial stop of the Petitioner was not to look for drugs, but was for the purposes of obtaining his identity, because Petitioner's conduct matched with certain of the elements contained in the "drug courier profile" thus, providing a reasonable basis of suspicion that Petitioner was engaged in the crime of transporting illegal drugs. Respondent recognizes that under Sibron v. New York, 392 U.S. 40 (1968), a Terry frisk to look for drugs is improper. However, in this instance there was no frisk, but rather there was a Terry stop which was subsequently followed by a voluntary consent to search. See generally, Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

Accordingly, Respondent submits that the "drug courier profile" contains sufficient objective facts upon which to stop an individual for the purposes of obtaining identification. As Respondent noted, this Court in Brown v. Texas, supra, at n. 2, seems to indicate that a trained and experienced law enforcement officer may be entitled to stop an individual for questioning when that conduct to the untrained eye appears to be wholly innocent. More importantly, there was more than just the fact that Petitioner got off a plane from a city from which drug traffic is known to originate. Petitioner's initial conduct fulfilled several parts of the "drug courier profile." The elements of the drug profile are not subjective, but are objective factors based upon the experience of trained and seasoned

law enforcement officers. The stopping of the Petitioner is nowhere near as egregious as that in Davis v. Mississippi, 394 U.S. 721 (1969), wherein this Court found that the stopping of Davis was for questioning as a potential suspect. Petitioner's conduct was more than that of a potential suspect, but was a detention based upon the reasonable suspicions of a trained law enforcement officer who used objective criteria embodied in the "drug courier profile."

Furthermore, as this Court noted in Terry v. Ohio, supra, at p. 19, n. 16, "not all personal intercourses between policemen and citizens involves 'seizures' of persons." In looking at the totality of the circumstances as revealed by the record, see, Beck v. Ohio, 379 U.S. 89, 91 (1964), the initial stopping of the Petitioner was not unreasonable seizure. See also, United States v. Smith, 574 F.2d 882 (6th Cir. 1978); United States v. Lewis, 556 F.2d 386 (6th Cir. 1977), cert. denied, 434 U.S. 985 (1978); United States v. Scott, 545 F.2d 38 (8th Cir. 1976), cert. denied, 429 U.S. 1066 (1977); United States v. Riggs, 474 F.2d 699 (2nd Cir. 1973), cert. denied, 414 U.S. 820 (1973); United States v. Allen, 421 F.Supp. 1372 (D.C. Mich. 1976).

Furthermore, this Court may properly conclude that with the initial stopping being a reasonable seizure, the fact Petitioner was discovered to be traveling under a false name colored conduct which might have appeared to the untrained observer to be innocent. Respondent respectfully submits this Court should conclude that on the basis of the operative facts and those particular portions of the "drug courier profile" which were used by the law enforcement officer in this case, the initial stopping for identification does not constitute an unreasonable seizure.

CONCLUSION

This Court should refuse to grant a writ of certiorari because no sufficient reasons for review have been set forth by the Petitioner.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Harrison Kohler, Attorney of Record for Respondent and a member of the Bar of the Supreme Court of the United States, certify that in accordance with the rules of the Supreme Court of the United States, I have served a true and correct copy of this Brief for Respondent upon Petitioner by depositing a copy of the Brief in the United States mail, with proper address and adequate postage to:

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This 19th day of December, 1979.

HARRISON KOHLER